

**BEFORE THE APPEALS BOARD
FOR THE
KANSAS DIVISION OF WORKERS COMPENSATION**

COLIN D. HOYT

Claimant

VS.

LOGISTICS EXPRESS

Respondent

AND

INS. CO. OF THE STATE OF PA.

Insurance Carrier

Docket No. 1,011,366

ORDER

Claimant requests review of the October 3, 2003 preliminary hearing Order entered by Administrative Law Judge (ALJ) Bruce E. Moore.

ISSUES

The ALJ found the claimant failed to sustain his burden of proof of personal injury by accident arising out of and in the course of employment with respondent. The ALJ further found the claimant failed to establish that he is in need of additional treatment and is temporarily and totally disabled by reason of a work-related injury.

The claimant requests review of this decision alleging the ALJ "improperly denied medical treatment on the ground that the claimant failed to sustain his burden of proof of personal injury by accident and/or arising out of and in the course of employment."¹ Claimant further asserts the ALJ "improperly found that the claimant had failed to establish

¹ Application for Review at 1.

that he is in need of additional treatment and is temporarily and totally disabled by reasons [sic] of his injuries."²

Respondent argues that the Board should affirm the ALJ's findings.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

Having reviewed the whole evidentiary record filed herein, the Appeals Board (Board) makes the following findings of fact and conclusions of law:

Claimant was employed by respondent as a long haul driver. He alleges an injury occurred in February 2001 and over the course of his employment, while driving a truck that had a broken and consequently unlevel seat, he suffered a series of injuries to his low back, hip and right leg.

Claimant sought treatment from at least two chiropractors for his back complaints. Those records include a history of back problems dating back to 1998, prior to his employment with respondent. These same records also include an indication from claimant that he attributed his back problems to events other than his work for respondent, including an accident where he was thrown from a lawn mower, an accident while pulling weeds and his activities as a farmer.

The Workers compensation Act places the burden of proof upon claimant to establish his right to an award of compensation and to prove the conditions on which that right depends.³ "'Burden of proof' means the burden of a party to persuade the trier of facts by a preponderance of the credible evidence that such party's position on an issue is more probably true than not true on the basis of the whole record."⁴ The Act is to be liberally construed to bring employers and employees within the provisions of the Act but those provisions are to be applied impartially to both.

The Act limits the Board's jurisdiction to review preliminary hearing findings. Consequently, at this juncture not every alleged error is subject to review. Generally, the Board can review preliminary hearing orders in which an administrative law judge has exceeded his or her jurisdiction.⁵ Moreover, the Board has specific authority to review the preliminary hearing issues listed in K.S.A. 44-534a (Furse 2000), which are: (1) did the

² Id.

³ K.S.A. 44-501(a); *Chandler v. Central Oil Corp.*, 253 Kan. 50, 853 P.2d 649 (1993).

⁴ K.S.A. 44-508(g); see also *In Re Estate of Robinson*, 236 Kan. 431, 690 P.2d 1383 (1984).

⁵ K.S.A. 2002 Supp. 44-551(b)(2)(A).

workers sustain an accidental injury; (2) did the injury arise out of and in the course of employment; (3) did the worker provide the employer with timely notice and with timely written claim; and, (4) do certain other defenses apply.

That portion of claimant's appeal which is aimed at the ALJ's decision not to award temporary total disability benefits is not a jurisdictional issue listed in K.S.A. 44-534a(a)(2). Therefore, the Board lacks the authority to consider that aspect of the ALJ's decision. The Board does, however, have jurisdiction to consider whether claimant met his burden of proving he sustained personal injury arising out of and in the course of his employment as those issues are specifically set forth in K.S.A. 44-534a (Furse 2000).

In this instance, the ALJ clearly reviewed the evidence presented by the parties and found the claimant had failed to sustain his burden of proof on the issues of: (1) personal injury by accident; and, (2) arising out of and/or in the course of employment. He also found the claimant failed to adequately establish that he is in need of additional treatment and is temporarily and totally disabled by reason of his alleged work-related injury.

The ALJ explained the factual basis for his findings as follows:

The evidence presented establishes that the seat in the truck operated by Claimant and Daniels [claimant's co-driver] was broken, and then replaced. Even if Claimant can establish micro-traumas to his back through riding on the replaced but unlevel seat, his evidence fails to establish that his present need for treatment, if any, is related to his work duties for Respondent, rather than the mower accident in which Claimant was thrown from a riding lawn mower into and over a headstone or due to work activities as a farmer. Claimant has attributed his back pain to both of these non-work-related events and activities.

The Court notes that it found Claimant to be less than credible. His failure and refusal to acknowledge his farming activities, despite representations made to his doctors, calls all of his testimony into question.⁶

The Board has reviewed the evidence and concurs in every respect with the ALJ's findings. The ALJ noted and the Board agrees that claimant's credibility has been significantly compromised by his failure to acknowledge his prior and subsequent injuries and the statements made by him to the health care providers. As a result, the Board finds no justification for disturbing the ALJ's Order.

WHEREFORE, it is the finding, decision and order of the Board that the Order of Administrative Law Judge Bruce E. Moore dated October 3, 2003, is affirmed.

IT IS SO ORDERED.

⁶ ALJ Order (Oct. 3, 2003) at 1.

Dated this _____ day of November, 2003.

BOARD MEMBER

c: E. Thomas Pyle, III, Attorney for Claimant
James M. McVay, Attorney for Respondent and its Insurance Carrier
Bruce E. Moore, Administrative Law Judge
Paula S. Greathouse, Workers Compensation Director